Stare decisis in European Law

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1. PRELIMINARY REMARKS

The subject I propose to discuss is certainly not a new one: Brown and Jacobs devoted a chapter to it in their book on the Court of Justice[1], and more recently, the matter was taken up in one of the contributions to the *Festschrift* for Hans Kutscher, former president of the Court.[2] It may, however, require further study, as it is liable to become one of the legal evergreens for coming generations.

The aim of this article is twofold: first, to put the subject into its comparative legal background, and then, to inquire whether the methods and techniques commonly thought to form the backbone of the doctrine of *stare decisis* apply in the field of European law. As the author is not trained in the common law of England, where that doctrine found its apogee, he took the liberty of considering Rupert Cross's book on precedent as an authoritative statement on the state of the English law.[3]

Most readers will be aware that each of these two themes could very well form the subject of a book; they will therefore, perhaps, forgive the somewhat terse and apodictive style of the following pages.

2. BACKGROUND

It is common ground, nowadays, that differences between common law systems, based on precedent, and the so-called 'civil law systems' of the European continent, founded on judicial interpretation of codified legal rules, should not be exaggerated.[4] In countries like Germany, Belgium and the Netherlands, and even in France, case-law has gradually become more impor-

1. Brown and Jacobs, *The Court of Justice of the European Communities* (London, 1977), ch. 14.
2. Lord Mackenzie Stuart and J.-P. Warner, "Judicial decisions as a source of Community law", in: Grewe-Rupp-Schneider (eds.), *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit* (Baden-Baden, 1981), p. 273.
3. Rupert Cross, *Precedent in English law* (3rd ed., Oxford, 1977); further referred to as: *Cross.*
4. Mauro Cappelletti, "The doctrine of stare decisis and the civil law: a fundamental difference – or no difference at all?" in: Bernstein-Drobnig-Kötz (eds.), *Festschrift für Konrad Zweigert* (Tübingen, 1981), p. 381.

tant than texts of codes or other statutes in many fields of law, for example in the law of torts. Concomitantly, the style of judicial reasoning has been changing: rather than subsuming a case under a given rule, continental courts tend to evolve principles for deciding which they discover in earlier judgments, or to situate the case before them in regard to earlier cases.[5] The common law countries, on the other hand, have the opposite experience, as legislative interference in matters which once belonged to the exclusive jurisdiction of the courts is fairly frequent. That is particularly so in the United States; even in Britain, however, many statutes replaced earlier judge-made law, in the interest of uniformity or of simplicity, or simply because Parliament was not satisfied with the law as it stood.

The difference in approach remains, but one should not overstate it. Two German authors have the following to say on the continental situation: 'It is true that no rule of law obliges a judge to follow the decision of a higher court, but the actual practice shows a different picture. A judgment of the French *Cour de cassation* or the German *Bundesgerichtshof* finds the same type of recognition by the lower courts as for example a judgment of an English or an American appeal court.'[6] On the other side of the Channel, Lord Scarman's professed attitude to the interpretation of statutes and to the role of the legislature does not seem to present any major divergence from a continental judge's way of reasoning[7].

There are more reasons for being careful. English and American authors discovered, sometimes to their astonishment, that parts of legal developments on the European continent showed striking similarities with the evolution of the common law. That was particularly true for French administrative law; as an American author put it, this part of French law was developed by the courts 'by practices thoroughly familiar to the Anglo-American lawyer'.[8] The French *Conseil d'Etat* did not, as French civil and commercial courts were supposed to do, devote its main energy to interpreting statutory provisions or filling gaps in a Code; it had to evolve the proper legal principles, much as the common law courts had done before, and since these principles had not been clearly expressed by the legislature, they had to be worked out by the gradual process of judicial inclusion and exclusion. To this extent, French administrative law seems to present features which are well-known to lawyers trained in the common law: not only because it is judge-made law but also because

5. Examples: Hoge Raad, 7 May 1976, *Wielemaker/De Schelde*, N.J. 1977 no. 55; Hoge Raad, 25 January 1980, *De Schelde/Wielemaker*, N.J. 1980 no. 282.
6. Zweigert-Kötz, *Einführung in die Rechtsvergleichung*, vol. I (Tübingen, 1971), p. 318; author's translation.
7. Lord Scarman, "Codification and judge-made law" (Holdsworth lecture, Birmingham 1966).
8. Bernard Schwartz, *French administrative law and the common-law world* (New York-London, 1954), p. 1.

of its techniques of relying on previous decisions.[9]

It is true that the case-law technique adopted by the *Conseil d'Etat* has never been based on any strict doctrine of *stare decisis*. It is a flexible approach, in which previous decisions are substantially followed rather than rigidly adhered to.[10] Here again, however, one should look at the other side of the coin. English law, taken as a whole, has traditionally been more flexible than simplified pictures of its rules and habits tended to suggest. The Court of Criminal Appeal, for example, did not consider itself bound to previous decisions if, on reconsideration, it found that the law had been misapplied or misunderstood; in Lord Goddard's words: the Court had 'to deal with questions involving the liberty of the subject', and this implied that there should be an exception to the rule of precedent if a full court was of the opinion that the previous decision was wrong.[11] The Criminal Division of the Court of Appeal acts along the lines traced by its predecessor, and accordingly adopts a somewhat looser position on precedent than the Civil Division of the same court.[12]

Recent developments in English law seem to favour flexible rather than rigid approaches. The famous Practice Statement 1966 was a formal move in that direction, and although some observers thought at the time that the Law Lords, trained as they were in the habit of appeal to precedent, would hardly find reason to apply the Practice Statement and disregard earlier decisions, some cases show the House of Lords' willingness to consider earlier judgments as wrongly decided and, consequently, to decline to follow them.[13] In a much more informal way, the Court of Appeal tried to follow suit. The Master of the Rolls, Lord Denning, considered the Court 'not absolutely bound' by its earlier decisions; and, what is more, he achieved a certain fame by his way of handling precedents and of ignoring House of Lords' judgments which he regarded as wrongly decided: 'any attempt to follow *Rookes v. Barnard* is bound to lead to confusion'; 'there is no discernible *ratio* among the majority of the House of Lords; in these circumstances, we think we are at liberty to adopt the reasoning which appears to us to be correct'.[14] It seems a far cry from the idea that 'the peculiar feature of the English doctrine of precedent is its strongly coercive nature'.[15]

Outside England and Wales, common law courts normally have more

9. See also Brown and Garner, *French administrative law* (2nd ed., London, 1973), p 2; C.J. Hamson, *Executive discretion and judicial control* (6th Hamlyn lecture, London, 1954), p. 132.
10. Brown and Garner, note 9 above, p. 154.
11. *R. v. Taylor* [1950] 2 K.B. 368.
12. *Cross*, p. 145.
13. *E.L. Oldendorff & Co. GmbH v. Tradax Export S.A.* [1974] A.C. 479.
14. Quotations taken from: Robert Stevens, *Law and politics* (London, 1979), pp. 491–502.
15. *Cross*, p. 4.

freedom to disregard or to overrule a troublesome precedent. That may be true for historical reasons, as in Scotland, where a larger court always had power to reconsider decisions of the appellate divisions of the Court of Session.[16] In Ireland – as in the United States – courts may depart from earlier judgments if constitutional issues arise, as the Constitution takes precedence over previous decisions. Moreover, the Irish Supreme Court seems to adhere to what it calls an 'elastic formula': when a court of ultimate resort is clearly of opinion that an earlier decision was erroneous, 'it should be at liberty to refuse to follow it, at all events in exceptional cases'.[17]

There may, therefore, not be a strict dividing line between courts at the appeal level which adhere and which don't adhere to precedent. It is much more a matter of degree. If we think of a sliding scale, the different English appeal courts do not occupy identical positions at one far end of the scale, and the French *Conseil d'Etat* has a place which is not far removed from that of the Irish Supreme Court. Our problem will consequently consist of trying to situate the Court of Justice of the European Communities somewhere on that scale. In order to do so, we shall first see whether conditions which, as experience has shown, favour the evolution of *stare decisis*, apply at the level of European law. Next, we shall see if we can find trace, in European case law, of the specific techniques English courts resort to in following previous decisions: the 'authority' of these decisions, their *ratio decidendi*, the difference between 'binding' and 'persuasive' precedents, the art of 'distinguishing' etc. We hope this survey will enable us to show that the European Court's position, on this issue, is not as far removed from that of the English courts as one might be inclined to think.

3. CONDITIONS

The first condition for a system of precedent to develop is that the main rules are unwritten. Such a situation may occur, as it did in medieval England, because no legislation of any importance exists and judges have to find the law which 'lies in their breast', or which they consider as the 'law and custom of the realm'.[18] That is, however, by no means the only relevant situation. In nineteenth century France, there was no lack of legislation, but nevertheless the *Conseil d'Etat* had to construct step by step its approach to the notion of 'legality'. It could do so, because existing legislation did not provide it with clear standards for determining whether the administration had acted within

16. Mackenzie Stuart and Warner (see note 2), at p. 275.
17. J.M. Kelly, *The Irish Constitution* (Dublin, 1980), pp. 266–269; Grimes and Horgan, *Introduction to law in the Republic of Ireland* (Portmarnock, Co. Dublin, 1981), pp. 60–65.
18. R.M. Jackson, *The machinery of justice in England* (7th ed., Cambridge, 1979), p. 10.

its powers.[19] In reviewing administrative action, it could therefore develop its own concepts, sometimes by gradually elaborating the basic idea of *excès de pouvoir* which it considered as underlying its general power of review, sometimes by framing certain principles intended to distinguish administrative behaviour from that of private persons, as it did in its case law on torts by public authorities (*responsabilité de la puissance publique*). In the latter case in particular, existing legislation was used as a stepping stone for finding new solutions of a different kind.

From this point of view, European law is comparable to French administrative law. There is legislation galore, in the treaties and in the thousands of regulations and directives, ranging from important rules on free movement of goods and of persons, or on competition, to abstruse provisions on monetary compensatory amounts. Nevertheless, the main rules for judicial activities are unwritten: the treaties are practically silent on the relationship between Community law and national legislations, and criteria for assessing the legality of Community decisions are expressed in a way which, though recalling the grounds for review known to French administrative law, leaves much room for interpretation, precision and further elaboration.[20] 'It is the European way', as the English Court of Appeal once put it, rightly asserting that 'the judges must divine the spirit of the Treaty and gain inspiration from it'.[21]

The second condition favouring *stare decisis* is the court's role as unifying element in a legal system characterized by centrifugal forces. In medieval England, the King's courts were able to achieve a 'common law' for the entire Kingdom, by first imposing it on the many local courts, often of Saxon origin, which applied their own local laws, and by then maintaining it against the stubborn resistance of ecclesiastical courts. The process took more than five centuries.[22] In France, the development of administrative law was closely linked to the endeavours of the central government to assert its authority. The *Conseil d'Etat* was Napoleon's creation, and the principle that ordinary courts had to abstain from interfering with administrative matters, and that it was the King and his advisers who had to assess whether administrative bodies had acted within their powers, had already been embodied in a decree of 1790.[23] Both the revolutionary governments and the Emperor attempted, by doing away with feudal remnants and by crushing regionalism, to make France '*une et indivisible*'; later Kings, Emperors and republican governments con-

19. T. Koopmans, *Vergelijkend publiekrecht* (Deventer, 1978), no. 31.
20. Article 173 EEC Treaty.
21. *Bulmer Ltd. and Showerings Ltd. v. Bollinger and Champagne Lanson Père et Fils*, [1974] All E.R. 1226.
22. Hanbury, *English courts of law* (3rd ed., Oxford, 1960), ch. II–III; Roscoe Pound, *The spirit of the common law* (Boston, 1921), ch. III.
23. Letourneur-Bauchet-Méric, *Le Conseil d'Etat et les tribunaux administratifs* (Paris, 1970), pp. 17–28 and pp. 79–81.

tinued the centralizing tradition, at least until recent years. The *Conseil d'Etat* had its role to play in the process.

Two features of the law of the European Communities reveal a similar unifying role for the Court of Justice. First, the dual system of jurisdiction ensures that national courts apply European law but that the Court of Justice is the ultimate instance for interpreting its provisions and appreciating the validity of Community decisions, the possibility, and sometimes the duty, to ask for preliminary rulings being the normal device for arriving at such a result.[24] As national courts are accustomed to applying their national law, and to perceiving problems which they have to resolve in the perspective of that law and, particularly, of its conceptual framework, the case-law of the Court of Justice has the obvious function of assuring the uniform application of Community law and, thereby, of gradually imposing it on national courts. To this extent, its work is comparable to that of the King's Bench in medieval England. The second element is that by whatever set of circumstances, politicians and governments take the European Treaties less seriously than they did in the early days of European integration, and that the decision-making machinery of the Communities is sometimes blocked; if, in such a situation, the political institutions fail to do their duty, the position of the judiciary may be reinforced. A court does not have the same choice as politicians may think they have: it is there to find the law and to apply it. The Council's unwillingness to act where it ought to can be no excuse for the Court of Justice to disregard requirements of Community law; but the Court will then come into an area where it necessarily creates precedent and where its European solutions may have to prevail over different measures established by national authorities.[25] The Court may thus, by its very functioning, become a unifying force.

The third condition for a system of precedent is more difficult to formulate: it is something like the necessity of resorting to principles. There is more likelihood that courts will follow previous decisions if these decisions are based on, or can be considered to frame, a general proposition of law.[26] The English law of contract was shaped in this way, and the continental law of torts presents, to some degree, similar characteristics. This is not to say that the methods of arriving at general propositions are identical. English courts have a more inductive way of reasoning, addressing themselves to the case at hand and deriving afterwards from that case and comparable cases a general rule by which to decide. Continental courts are rather inclined to state the general rule first, and to widen or restrict its scope somewhat in later cases. From this point of view, the case-law of the *Conseil d'Etat* fits entirely in the

24. Article 177 EEC Treaty.
25. Case 804/79, *Commission v. United Kingdom* (fishery case), [1981] E.C.R. 1045.
26. Helmut Coing, "Aufgaben der Rechtsvergleichung in unserer Zeit", N.J.W. 1981, p. 2601.

continental pattern: it first stated, for example, that the *respect des droits de la défense* was a general principle of law, to be observed by the administration, and it was only in later decisions that it set out to define the scope of that principle, in cases like those concerning withdrawal of a license for a news-agent.[27]

On this point, the record of the Court of Justice shows, on balance, a continental approach. There is no need to repeat here that many principles of European law have found their first expression in the Court's case-law; examples abound, but for present purposes it is sufficient to point to the direct effect of Treaty provisions, to the priority of Community law, and to the unwritten principle of Community law that human rights should be secured.[28] In all these instances, principles appear in the Court's case-law, to be gradually elaborated and circumscribed in later cases. The same method of reasoning is used when the Court discovers, in interpreting the Treaty, certain general propositions of law: such as the rule Mr. Advocate-General Warner used to call 'the *Petroni* principle'.[29] In its early and unpolished form, the rule stated that the Council was enabled, by Article 51 of the EEC Treaty, to adopt, in the field of social security, coordinating measures necessary 'to ensure free movement of labour', and that it had, therefore, no power to adopt rules which would have the effect of taking away advantages migrant workers are entitled to by virtue of the national legislation of a Member State; in later cases, the rule was refined, particularly with regard to the application of anti-cumulation rules.[30] In all these cases, however, the mere fact that the Court states a principle, or a general rule of law, renders its decision in practice, by sheer necessity, a precedent, to be relied on in later cases.

4. PRECEDENT

The Court of Justice is in the habit of invoking its previous decisions and, normally, it says so explicitly. Some authors affirm that the Court adopted this habit in more recent years, and they often suggest that this development might have something to do with the accession of Britain and Ireland to the Communities in 1973.[31] That is, however, a myth: from its earliest days, the Court referred to its previous case-law. The first example can be found in the first volume of the Reports.[32] Thus, as early as 1956, the Court quoted an

27. CE 5 May 1944, *Veuve Trompier-Gravier*, Rec. 138.
28. Case 11/70, *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125.
29. Opinion in case 733/79, *La Terza*, [1980] E.C.R. 1915 (Mr. Warner).
30. Case 24/75, *Petroni*, [1975] E.C.R. 1149; Case 98/77, *Schaap*, [1978] E.C.R. 707; Case 105/77, *Boerboom-Kersjes*, [1978] E.C.R. 717.
31. H.G. Schermers, *Judicial protection in the European Communities* (2nd ed., Deventer, 1979), no. 123.
32. Case 4/54, *ISA*, E.C.R. I (1954–55) 177, English text 91.

earlier decision as authority for the proposition that certain provisions of the Coal and Steel Treaty were of a 'fundamental character'.[33] And in one of its *Meroni* judgments, in 1958, the Court refused to accept an *argumentum a contrario,* because it had already said in earlier decisions that such an argument could only be used under certain strictly defined conditions.[34] Other early cases show the same picture.[35] The Court's case-law on EEC matters simply continued this trend. In one of the first social security cases, the Court relied on previous decisions in its interpretation of Article 51 of the Treaty.[36] There is nothing new since 1973 from this point of view, except, of course, that there is more previous case-law to refer to. In recent years, the Court sometimes impatiently rebuts an argument by saying that it has 'repeatedly held' that the argument was not correct.[37]

As a rule, the Court sticks to its earlier case-law. There are judgments in which a departure from previous decisions can be discovered, but normally, they come down to attempts at refining, narrowing or widening rules or principles which the Court had established earlier. That may be so, because experience has shown that the way of framing such a rule or principle had been too general to take account of the infinite variety of cases; it may also be a consequence of new developments that could not be foreseen when the earlier judgment was given. The latter circumstance occurred, for example, when the Court changed its attitude to the provisional validity of agreements under Article 85 of the EEC Treaty, after it had become clear that the Commission had adopted the stratagem of not deciding on the compatibility of certain agreements with the Treaty, but of simply 'filing the case'.[38] However, some rare judgments can be found in which the Court seems to overrule an earlier decision.[39]

The question whether inferior courts are bound to apply the Court's case law is somewhat tricky: national courts are not 'inferior courts' in the same sense as the English High Court is inferior to the Court of Appeal and to the House of Lords – there is no formal hierarchy between the Court of Justice and national courts, who have their own place and their own responsibility under their national constitution. And as the Court of Justice is not an

33. Joined Cases 7 and 9/54, *Groupement des industries sidérurgiques luxembourgeoises,* E.C.R. II (1955–56) 53, English text 175.
34. Case 9/56, *Meroni,* E.C.R. IV (1958) 11, English text 133.
35. Joined Cases 7/56 and 3-7/57, *Algera,* E.C.R. III (1957) 81, English text 39; Joined Cases 1 and 14/57, *Société des usines à tubes de la Sarre,* E.C.R. III (1957) 203, English text 105; Joined Cases 36–38 and 40–41/58, *Simet,* E.C.R. V (1958–59) 331, English text 157; Case 14/59, *Fonderies de Pont-à-Mousson,* E.C.R. V (1958–59) 445, English text 215.
36. Case 44/65, *Hessische Knappschaft,* [1965] E.C.R. 1191, English text 965.
37. Case 113/80, *Commission v. Ireland,* [1981] E.C.R. 1625.
38. Joined Cases 253/78 and 1-3/79, *Giry et Guerlain,* [1980] E.C.R. 2327 (perfume cases).
39. Brown and Jacobs, note 1 above, p. 233.

appeal court, it can not compel national courts to follow its precedents. Since, however, the mechanism of preliminary rulings, as it is fashioned by Article 177 of the EEC Treaty, is intended to ensure the uniform application of Community law, it implies the Court's power to impose its views on national courts. This is particularly so because supreme courts are obliged to refer matters of European law to the Court of Justice. In one of its early EEC cases, the Court held that this obligation did not exist any more if the question of interpretation in issue had already been decided by the Court, although the national court remained at liberty to requestion the Court.[40] More recently, the Court clarified its position in a case concerning the validity of certain Community measures: an earlier decision declaring these measures invalid, though formally only binding the national court having referred the problem to the Court, is in principle to be followed by any other national court – it should only refer if it feels doubts, for example as to the extent or the consequences of the invalidity already pronounced.[41] Thus, differences between annulment under Article 174 and declarations of invalidity under Article 177 gradually become a matter of degree rather than of principle.[42] However that may be, the Court seems to consider that judgments given under Article 177 form precedents for national courts. It went even one step further when it decided, in some references for preliminary rulings, that national courts have no power to apply criminal sanctions on the basis of national statutes which the Court had earlier considered as being in breach of Community law in an action under Article 169.[43] Sometimes, therefore, national courts are to follow judgments rendered in a direct action by the Commission against a Member State.

The Court's view on how its decisions form precedent for national courts does not, of course, necessarily mean that national courts always take the same view. In fact, attitudes differ from court to court, and from subject to subject. Some national courts profess their willingness 'to learn a new system', as the English Court of Appeal put it once; others follow more or less reluctantly the guide-lines resulting from the Court's case-law.[44] It took the Italian Supreme Court some years to accept the supremacy of Community law over later national statutes. The Court's quite original approach to the concept of 'measures having equivalent effect' to quantitative restrictions, and the ramifications thereof in the fields of patents, trade marks and copyright, are normally adhered to without any fuss by the national courts; but its opinion that some provisions of directives may be relied upon by citizens or cor-

40. Joined Cases 28-30/62, *Da Costa en Schaake,* [1963] E.C.R. 59, English text 31.
41. Case 66/80, *International Chemical Corporation*, [1981] E.C.R. 1191.
42. Gerhard Bebr, "Preliminary rulings of the Court of Justice: their authority and temporal effect", 18 C.M.L.Rev. 1981, 475.
43. Case 88/77, *Schonenberg*, [1978] E.C.R. 473.
44. Gerhard Bebr, "A critical review of recent case law of national courts", 11 C.M.L.Rev. 1974, 408.

porations in actions against public authorities has been rebuked, expressly or implicitly, by some national courts, and notably by the French *Conseil d'Etat* and the German *Bundesfinanzhof.*[45] On the whole, however, national courts tend to comply with the Court's position; if they do not, they are normally aware of acting in breach of the system of European law. One could say that, in such a case, stronger loyalties to concepts of their national law prevail. It is interesting to note that criticism of this attitude invariably takes the view that national courts ought to follow the Court's precedents and that, if they feel dissatisfied, they should requestion the issue by referring the matter to the Court.[46] One cannot help feeling, in reviewing the national case-law most readily available, and the literature on the subject, that there is a general acceptance of the national courts' duty to conform to European law as it is understood by the Court of Justice. This principle has itself been hammered out by the Court and therefore, in a way, constitutes proof of its own truth.

5. AUTHORITY

The English doctrine of precedent involves two distinct features: a judicial decision is binding authority for some courts (inferior courts, or sometimes for the court having given the decision), and it is 'persuasive' authority for some other courts (superior courts, or courts of some Commonwealth countries).[47] It would not be possible to find as clear-cut a distinction in the field of European law, but certain of its characteristics seem to suggest that the difference between the two forms of authority is not entirely unknown.

'Authority' means, in this context, that judicial decisions enjoying it are elevated to a source of law in the full sense of the term. They imply, by their very existence, the duty of other courts to follow them or, if they have only persuasive authority, to deviate but sparingly and for important considerations. That other institutions, such as government or Parliament, have to consider judicial decisions as true interpretations of the law as it stands appears to be self-evident under the British constitution. The somewhat loose institutional structure of the Communities provides something to the same effect; according to Article 164 of the EEC Treaty, the Court has to ensure the observance of law in the interpretation and application of the Treaty – generally, i.e. not merely in the application of the Treaty by the judiciary. The other institutions of the Communities recognized this role of the Court explicitly: the famous 'joint declaration' of the European Parliament, the

45. CE 22 December 1978, *Cohn-Bendit*, (1980) 1 C.M.L.R. 543; BFH 16 July 1981, 6. *Umsatzsteuerrichtlinie*, (1982) 1 C.M.L.R. 529.
46. Opinion of *commissaire du gouvernement* Genevois in *Cohn-Bendit* (see note 45).
47. *Cross*, pp. 6, 38, 103–105.

Council and the Commission on the protection of fundamental rights, after having recalled that the European Communities are based on the principle of respect for the law, states that the law comprises, 'as the Court of Justice has recognized', the general principles of law and in particular the fundamental rights.[48] Thus the Court's two or three judgments on this matter were taken as authority for the existence of a rule of law of considerable scope and importance.

At the judicial level, things are more complicated. In oral hearings before the Court, parties often refer to earlier case-law as evidence of the existence of certain rules or principles, although German barristers try occasionally to convince the Court that it should overrule an earlier decision. For the Advocates-General of the Court, previous decisions are proof of the actual state of Community law; normally, they tend to situate the case at hand in regard to earlier judgments, which they consider as binding authority. This tendency is by no means confined to British Advocates-General; some striking examples may, for example, be found in opinions of Mr. Advocate-General Reischl.[49] Mr. Warner once went somewhat further, when he explained that earlier judgments, given against his opinion, had 'convinced' him that he was on the wrong track.[50]

Opinions of Advocates-General are considered as persuasive authority by the parties, who regularly invoke them before the Court, and by the Advocates-General themselves. In staff cases, for example, the opinion of Mr. Advocate-General Mayras that staff regulations are not something unchangeable but can, in principle, always be modified by the Council, even to the prejudice of Community officials engaged under a more advantageous regime, is frequently discussed.[51] The Court's judgments do not say a word on the authority of opinions.

It would not in itself, be illogical if the Court and its Advocates-General considered national judgments on matters of Community law as persuasive authority. No evidence to that effect can, however, be found. Neither does the Court expressly disprove national judgments, even if it might have ample reason for doing so.

When the Court relies on its own judgments, it appears to consider them as binding authority. A well-known example is its case-law on the legal force of the explanatory notes to the Brussels Customs Convention: after having settled its conviction, it regularly quoted its earlier decisions as a source of law, nearly in the same way as it might have quoted a Treaty provision.[52] Its case-law on Article 177 seems to imply that it thinks national courts

48. O.J. 1977, C 103/1.
49. Opinion in Case 246/80, *Broekmeulen,* [1981] E.C.R. 2332 (Mr. Reischl).
50. Opinion in Case 99/80, *Galinsky,* [1981] E.C.R. 941 (Mr. Warner).
51. Opinion in Case 167/80, *Curtis and others,* [1981] E.C.R. 1512 (Mr. Capotorti).
52. Case 35/75, *Matisa-Maschinenbau,* [1975] E.C.R. 1205.

should do the same. There is, however, no case-law defining the kind of authority the Court's judgments ought to have for national courts; the reason is probably that the national court's power of requestioning under Article 177 remains unfettered. Mr. Advocate-General Warner had no doubt that the Court's judgments are binding authority, and not merely persuasive, for the national courts, although he admitted that these courts could always refer the case to the Court for reconsideration if they had any misgivings about the correctness of the decision.[53] He did not limit this power of national courts to the possibility of challenging earlier decisions thought to be given *per incuriam*; such a view might be consistent with the English doctrine of *stare decisis*[54], but it could not be reconciled with the general terms in which Article 177 is couched. In the words of Lord Evershed, a decision is given *per incuriam*, and therefore no authority, if it is given in ignorance or forgetfulness of some statutory provision or of some authority binding on the court, so that some step in the reasoning on which it is based is found on that account to be 'demonstrably wrong'.[55] The concept has not yet found its place in European law.

6. RATIO DECIDENDI

The notion of *ratio decidendi* is probably the crux of the doctrine of *stare decisis*. In English law, the only part of a previous decision which is binding is its 'reason for deciding', and not 'everything said by a judge when giving judgment'.[56] The reasons which support the actual decision form precedent; not the *obiter dicta* consciously or unconsciously added to these reasons. The distinction, though completely comprehensible – even to the outsider – at first sight, has been conducive to innumerable difficulties and to hair-splitting debates: what is, for example, the *ratio decidendi* when a court arrives at its decision by two independent lines of reasoning, or when an appeal court consists of three judges giving *seriatim* opinions which embody three different views?[57] Leaving such particular problems to the English lawyers, we shall try to concentrate on the principle.

According to Cross's definition, the *ratio decidendi* of a case is 'any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him'.[58] The problem then is, whether such a concept can also be discovered in European

53. Opinion in Case 112/76, *Manzoni*, [1977] E.C.R. 1647 (Mr. Warner).
54. *Cross*, pp. 143–144.
55. *Morrelle Ltd. v. Wakeling*, [1955] 2 Q.B. 389.
56. *Cross*, pp. 38–39.
57. *Cross*, pp. 86–99.
58. *Cross*, p. 76.

law, and whether it is a useful tool of analysis. There is hardly any doubt that the answer to this double question must be in the affirmative.

With regard to the first problem: is the Court itself, when relying on its earlier cases, aware of the distinction between *ratio decidendi* and *obiter dicta*? There is one striking example to show that it is.[59] The case concerned monetary compensatory amounts on export of powdered whey. In 1978, the Court had declared invalid, in a reference for a preliminary ruling, a Commission regulation of 1975 imposing those amounts.[60] After that decision, a corporation sought to recover monetary compensatory amounts it had paid on the export of powdered whey; these amounts had, however, been levied under other Commission regulations than the one considered by the Court in the earlier case. The matter was referred to the Court. Mr. Advocate-General Capotorti analysed the regulations in issue and came to the conclusion that they all rested on the same basis as the regulation that the Court had held invalid; he suggested, therefore, that the Court should reproduce the reasoning it had presented in the earlier case. The Court, however, took a different line.[61] After having recalled that its earlier decision held the Commission regulation invalid because of not complying with a certain requirement of Community law, it went on to say that

> 'it is not disputed that that requirement was disregarded by all the regulations in dispute, the successive redrafting of which had moreover the purpose only of amending the rates necessary for the application of monetary compensatory amounts in order to bring them into line with changes in currency parities'.

And it is appropriate to quote here the comment made by Mackenzie Stuart and Warner in their article in the Kutscher *Festschrift:*

> 'The Court thus, we suggest, approached the problem much as a common law judge might have done: presented with a decision which was obviously analogous, it extracted the basis of the judgment, the *ratio decidendi*, considered whether that *ratio* applied equally to the case before it and, having decided that it did, in the light of the earlier judgment proceeded to apply it'.[62]

The second problem is: does the Court consider that national courts are only bound by the *ratio* of its earlier judgments? Here also, there is little room for doubt. When the Court held that national courts should follow its rulings on the invalidity of Community measures, but that they remained at liberty, by virtue of Article 177, to refer the matter to the Court if they would feel doubts, it took care to discourage national courts from asking questions as to the *ratio* of the invalidity, by suggesting that national courts might, for

59. I borrow this example from Mackenzie Stuart and Warner (see note 2), at 279–281.
60. Case 131/77, *Milac*, [1978] E.C.R. 1041.
61. Case 130/79, *Express Dairy Foods*, [1980] E.C.R. 1887.
62. At page 281.

example, have doubts with regard to the extent of the invalidity already pronounced, or with regard to its consequences.[63] This can only be understood as meaning that national courts are bound by the *ratio* of the earlier judgment.

The third problem is: do national courts themselves consider that they are only bound by the *ratio* of the Court's earlier judgments? Some evidence suggests that they do, the most eloquent example being that of the heroin cases. The first heroin case had been referred to the Court of Justice by a German court which had difficulty in calculating customs duties on heroin seized at the Dutch-German frontier and subsequently destroyed as being dangerous for public health. At the request of the Court of Justice, the Commission provided information on the practice of other Member States, and it became apparent that they did not levy any import duties on heroin but applied only criminal sanctions to the smugglers. The information was available to the German court which then took the unusual step of adding a second question: would it not be contrary to the idea of a customs union if a product was subject to customs duties in one Member State and free from such duties in the other Member States? The Court, however, took a slightly different line: it analysed the structure of the common customs tariff and it inferred from this analysis – for reasons which are not relevant for our present purposes – that under the common tariff customs duties could only be applied to products intended to be put into economic circulation; it concluded, therefore, that Member States had no power to levy customs duties on products which had been seized at the frontier and destroyed as being dangerous for public health.[64] Shortly after the judgment had been given, two other German courts referred new questions on the import of heroin to the Court: they wanted to know, in particular, whether it was necessary, for applying the Court's ruling, that the heroin had been seized and destroyed or whether, on the contrary, the ruling also held for heroin which had not been found, or which had been reexported to a third country.[65] These two cases amount to a demand for clarification of the *ratio decidendi* of the earlier case: is the seizure and destruction of the product an essential part of the Court's reasoning, or is it accidental, in the sense that it could be left out of the reasoning without touching the Court's line of arguing.[66] Similar problems are well-known in English law.[67]

The concept of *ratio decidendi* is, therefore, a concept which, though developed in the common law, proves workable in European law. The term itself never appears in actual case-law, but its use helps to explain the way in which the system of precedent is functioning.

63. *International Chemical Corporation* (see note 41).
64. Case 50/80, *Horvath*, [1981] E.C.R. 385.
65. Case 221/81, *Wolf*, O.J. 1981, C 203/5; Case 240/81, *Einberger*, O.J. 1981, C 245/5.
66. At the moment of writing, the two cases have not yet been decided.
67. *Cross*, pp. 42–45.

7. DISTINGUISHING

The art of distinguishing is the final component of *stare decisis*. In a way, it is the reverse of the *ratio decidendi*. In the words of Lord Reid,

> 'it matters not how difficult it is to find the *ratio decidendi* of a previous case, that *ratio* must be found; it matters not how difficult it is to reconcile that *ratio*, when found, with statutory provisions or general principles, that *ratio* must be applied to any later case which is not reasonably distinguishable".[68]

This method of 'reasonably distinguishing' is a kind of art, because it often leaves a certain choice to the judge: it is up to him to determine the *ratio* of the previous case, and in doing so he may either enlarge or restrict the scope of the earlier decision.[69] Consistency may thus give way to other considerations, depending on differences in context, in social factors, or simply in appreciating whether the result is justifiable in the case at hand. The dialectic between consistency and these other considerations, or, as a German lawyer would put it, between 'system-oriented' and 'object-oriented' approaches, is part of the charm of the common law.

The Court of Justice is, in comparison with the English courts, a young court, and it has not yet developed a real art of distinguishing. Nevertheless, certain finger exercises for such an art can be found in its case-law: its work consists partly of excluding or including new cases with regard to its earlier rulings. Normally, however, it does so without insisting very much on possible differences with previous cases. In the French lamb case, for example, it refused to narrow down the ambit of the principle developed in *Charmasson*, according to which national market regulations for agricultural products, though still allowed under Title II of Part II of the EEC Treaty (agriculture), have to comply with the requirements of Title I (free movement of goods)[70]; but it scarcely examined if there were reasons for making a distinction. More fully argued is a recent case, in which the Court stated the reasons for not giving prospective effect to a declaration of invalidity, thereby distinguishing it from the famous second *Defrenne* case.[71] And in the perfume cases[72], the Court explained its motives for limiting the scope of its earlier decisions on the provisional validity of agreements under Article 85 of the Treaty.

A judgment of 1981 is, perhaps, more illustrative of the delicate balance which is so characteristic of the art of distinguishing.[73] It concerned an Italian

68. *Nash v. Tamplin & Sons Brewery Brighton Ltd.*, [1952] A.C. 231.
69. *Cross*, pp. 182–188.
70. Joined Cases 24 and 77/80R, *Commission v. France*, [1980] E.C.R. 1319; Case 48/74, *Charmasson*, [1974] E.C.R. 1383.
71. Joined Cases 66 and 127–128/79, *Salumi*, [1980] E.C.R. 1237; Case 43/75, *Defrenne*, [1976] E.C.R. 481.
72. See note 38.
73. Case 46/80, *Vinal and Orbat*, [1981] E.C.R. 89.

system of differential taxation on denatured synthetic ethyl alcohol and denatured alcohol obtained by fermentation of agricultural products, wine in particular. The question was whether such a system was compatible with Article 95 of the Treaty, which forbids Member States to impose on products of other Member States any internal charges higher than those applied to 'similar domestic products'. Were the two products in question 'similar' in the sense of Article 95? The importer of the synthetic ethyl alcohol said yes, and his position was supported by the Commission: the two kinds of alcohol were fully interchangeable in their uses and they fell within the same sub-heading of the common customs tariff.[74] The Italian government said no, claiming a specific justification for the differing tax arrangements in that they were intended to promote the processing of agricultural surplus products and to reduce, correspondingly, the use of petroleum products. That seemed sensible enough. But in earlier alcohol cases, the Court had considered that Article 95 was applicable to tax differences concerning very diverging kinds of alcoholic beverages, for example cognac and whisky.[75] In these cases, it had held that differences in raw materials from which the products had been obtained, and differences in patterns of consumption with regard to the drinks, did not necessarily matter for the application of Article 95. Nevertheless, the Court followed the Italian government's argument in the present case. It considered that the decision 'to favour the manufacture of alcohol from agricultural products and, correspondingly, to restrain the processing into alcohol of ethylene, a derivative of petroleum, in order to reserve that raw material for other more important economic uses' as a 'legitimate choice of economic policy', to which 'effect is given by fiscal means'. And it went out of its way to stress the importance of such a choice, which pursued 'economic policy objectives which are themselves compatible with the Treaty and its secondary law' such as regulations and directives.

What it boils down to is distinguishing the case by introducing a new standard which had not been apparent from earlier case-law. The latter seemed to have established criteria for assessing the similarity of products, but the new case adds a rider: if certain conditions are met ('legitimate economic policy' etc.), the case is outside the scope of these criteria. Thus, the 1981 judgment might well be taken as an illustration of the tension between consistency and policy arguments which is well-known in national law, for example in the field of torts.[76]

As the Court's case-law on different matters is gradually growing – competition, social security, industrial property, internal taxes – the odds are that further experiments in the art of distinguishing will not be slow to develop.

74. No. 22.08: denatured spirits (including ethyl alcohol and neutral spirits) of any strength.

75. Case 168/78, *Commission v. France*, [1980] E.C.R. 347.

76. B.S. Markesinis, *Policy factors and the law of tort*, The Cambridge lectures 1980, ch. 16.

8. CONCLUSION

The upshot of this brief survey can be summarized in a few words. Although the Court's way of formulating principles, or general propositions of law, is closely akin to methods used by the French *Conseil d'Etat*, its techniques of relying on previous cases, of invoking the authority of its own case-law and of determining the *ratio decidendi* of earlier judgments are not dissimilar to those used by the English common law courts. At the same time, the Court endeavours to impose similar techniques on the national courts.

The actual climate of European law appears to favour the evolution of *stare decisis*. Community institutions, Member States, national courts, big enterprise and private parties often expect the Court to untie some of the Gordian knots that are twined by the interplay of competing forces: the dynamics of the development of European law in relation to the tenacious resistance of national traditions; common policies for some matters but national autonomy in closely related matters; the partial nature of European integration in many fields, and the accompanying duty of Member States to facilitate the implementation of Community measures, and so on. If the Court cannot cut such a knot with the authority which properly belongs to the judicial office, it fails in its task. But who should be amazed, then, that the Court relies on this authority when faced with the next Gordian knot?

If a court's 'awesome power', as Mr. Justice Frankfurter once called it[77], is not used with a minimum of consistency, its importance will rapidly diminish. For the moment, however, and for the years to come, the European Communities, with their weak political tradition and their defective legislative machinery, could scarcely do without this awesome power: they would indeed have a bumpy ride. And here again, comparisons with medieval England do not seem entirely pointless.

77. Justice Frankfurter, dissenting, in *Trop v. Dulles*, 356 U.S. 86 (1958).